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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

No. [redacted]

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,

Plaintiff in Error,

vs.

ALVIN J. FINK,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ROY G. FITZGERALD,
Attorney for Defendant in Error.

BRIEF BY
ROY G. FITZGERALD,
THOS. H. FORD,
WAYNE F. LEE,
WM. F. HYERS.

THE TOLEDO LEGAL PRINTING COMPANY,
PRINTERS.

IN THE

Supreme Court of the United States

No. 754.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,

Plaintiff in Error,

vs.

ALVIN J. FINK,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

FACTS.

In September, 1910, the defendant in error, Fink, at Dayton, Ohio, entered into negotiations with a person at Los Angeles (W. J. W—) to trade coins for Indian Relics. Fink sent the coins to the Postmaster at Los Angeles to be delivered to W. if, upon inspection of the Indian Relics by Fink, he was satisfied to trade.

The Indian Relics were shipped to Fink by freight and billed as "Indian Curios". When they arrived in Dayton Fink could not inspect them except by paying the charges made by the Railway Company, plaintiff in error. The company claimed $15.00 for freight charges and Fink paid this amount, received and inspected the goods and decided to conclude the trade and the coins were turned over to W. at Los Angeles by the Postmaster.

After the lapse of about a year the Railway Company claimed that the correct freight rate on "Indian Curios" from Los Angeles to Dayton was $30.00 instead of $15.00, and after the Indian Relics had been sold or scattered and Fink was without recourse, demanded an additional $15.00 from Fink which he refused to pay and upon trial to a jury judgment was entered in his favor. No bill of lading was introduced in evidence.

It is contended on behalf of Fink:

1. That the shipment was "Indian Relics" and not "Indian Curios".
2. That no competent evidence was introduced to prove what the rate was upon either Curios or relics and no evidence at all as to the rate on "Indian Relics".
3. That even if an incorrect freight rate was charged and collected, Fink is not liable for the following reasons:
   A. He had not agreed to pay the freight (p. 21).
   B. He was not the owner of the goods shipped, nor did he become the owner until after he inspected and decided to keep them (p. 21).
   C. There was no contract express or implied obligating Fink to pay the freight.

Fink neither expressly nor impliedly agreed to pay any freight.

The railroad company made it a condition that he pay the bill of $15.00 before he could examine the goods offered him by the shipper, and the case of *U. P. R. Co. vs. Am. S. & R. Co.*, 202 Fed., 720, cited by plaintiff in error is therefore not applicable. Plaintiff in error's other cases are based upon bills of lading stipulating that the "consignee is to pay the freight."

As between Fink and the railroad company the principle of estoppel still applies as stated in

Hutchinson on Carriers (3rd Ed.), 807.

Central R. R. of N. J. vs. McCartney, 68 N. J. L., 165.

For while the amount of the freight rate is not the subject of private contract, the law must not be used as an instrument of injustice and oppression and that without any justification based upon the requirement of the Interstate Commerce Act to collect the lawful freight because—

The consignor is primarily liable and even if the charges were to be collected from the consignee, the liability of the consignor is not discharged.

British & F. M. Ins. Co. vs. Portland F. M. Co., 124 Fed., 855; 130 Fed., 860.

Finn vs. The W. R. R. Co., 112 Mass., 524.

55 Am. & Eng. R. R. Cases, 695.

2 Hutchinson on Carriers, 900.

Atlas S. S. Co. vs. Colombian Land Co., 102 Fed., 358; 42 C. C. A., 398.

Great Western R. R. Co. vs. Bagge, 15 Q. B. Div., 626.

B. & O. R. R. vs. New Albany Box & B. Co., 94 N. E., 906; 48 Ind. App., 47.

Keeling & F. vs. Walter Connally & Co., 157 S. W., 232.

Chicago, R. I. & G. Ry. Co. vs. Floyd, 161 S. W., 954.

THE LAW.

The Inter-State Commerce Act simply enjoins upon a carrier the duty of collecting the proper freight charges from the party who is legally liable at common law to pay and does not create any new liability or impose any additional burden upon consignor or consignee.

"* * * * nor shall any carrier charge or

demand or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time."

Quoting from §6 of Interstate Commerce Act of Feb. 4th, 1887, and amendments (§6425 R. S.).

"The law requires the carrier to collect and the party legally responsible to pay the lawfully established rates without deviation therefrom. It follows that it is the duty of the carrier to exhaust their legal remedies in order to collect undercharges from the party or parties legally responsible therefor. It is not for the Commission, however, to determine in any case which party, consignor or consignee, is legally liable for the undercharge, that being a question determinable only by a court having jurisdiction and upon the facts of each case."

Rule No. 314, Collection of Undercharges, Conference Rulings of the Interstate Commerce Commission.

At common law there is a presumption of fact that the consignee is the owner of goods shipped and hence liable for freight.

4 Elliott on Railroads, §1559.

But this presumption may be rebutted by proof of the facts, as in this case.

Blanchard vs. Page, 8 Gray (Mass.), 281.
Saunders vs. Van Zeller, 4 Ad. & El. N. R., 260.
Van Zile on Bailments & Carriers, §702.
Lawrence vs. Minturn, 17 Howard, 100.

Fink's position in this case is sustained by well considered opinions in the states of Alabama and New York.

> "The consignee's acceptance and removal of the goods sold to it f. o. b. its station with knowledge that the carrier was giving up a lien thereon for freight undercharges did not create an obligation on its part to pay the freight charges at the request and for the convenience of the consignor beyond the amount stated."
>
> Central of Georgia Ry. Co. vs. Southern Ferro C. Co., 68 So. Rep., 981.

> "It is unlawful for a carrier to contract to carry interstate freight at a lower rate than that scheduled, and neither by contract nor through mistake or inadvertence can it estop itself from collecting the balance of the lawful rate although it has delivered the goods without charging the rate in full.
>
> But where a carrier delivered goods shipped C. O. D. to the consignee who was agent of the consignor, and by mistake charged the consignee less than the legal rate of carriage, it cannot recover the balance from the consignee where the latter has sold the goods and accounted for the proceeds to his principal."
>
> Penn. R. R. Co. vs. Titus, 156 N. Y. App. Div., 830.

Respectfully submitted,

ROY G. FITZGERALD,
Attorney for Defendant in Error.

BRIEF BY
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THOS. H. FORD,
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